

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MANUEL FLORES,)	No. C 04-3409 SBA (PR)
)	
Petitioner,)	<u>ORDER DENYING PETITION</u>
v.)	<u>FOR WRIT OF HABEAS</u>
)	<u>CORPUS</u>
A.P. KANE, Warden,)	
)	
Respondent.)	
_____)	

INTRODUCTION

Petitioner Manuel Flores, a state prisoner incarcerated at the Correctional Training Facility, filed this pro se action seeking a writ of habeas corpus under 28 U.S.C. § 2254. The matter is now submitted for the Court's consideration of the merits of the petition. For the reasons discussed below, the petition is DENIED as to all claims.

PROCEDURAL BACKGROUND

In 1990, Petitioner was convicted in the Los Angeles County Superior Court of three counts of kidnap for robbery in violation of California Penal Code § 209(b). He was sentenced to a term of seven years to life in state prison. The present petition does not challenge Petitioner's underlying conviction. Rather, it challenges the denial of parole suitability by the Board of Prison Terms ("BPT") at a hearing held in May, 2003.

At the 2003 hearing, the BPT found Petitioner unsuitable for parole and denied him another hearing for a period of two years. (Resp't Ex. 3 at 51-52.) Petitioner sought habeas corpus relief from the Los Angeles County Superior Court which, in a reasoned decision, denied the petition. (Resp't Ex. 7, 8.) Thereafter, the California Court of Appeal summarily denied a petition challenging the 2003 hearing. (Resp't Ex. 9.) The California Supreme Court denied Petitioner's request for review. (Resp't Ex. 11).

On August 19, 2004, Petitioner filed the present petition, challenging only the denial of parole at his 2003 hearing (docket no. 1). Petitioner claims that the 2003 parole denial violated his right to due process because the BPT did not meet the "some evidence" standard to support its

1 decision, and because the BPT relied solely on the nature of the commitment offense.

2 On February 6, 2006, Respondent filed a motion to dismiss the petition, arguing that the
 3 petition should be dismissed for lack of subject matter jurisdiction as to the equal protection claim
 4 on the ground that Petitioner had failed to allege sufficient facts to state a prima facie claim and as
 5 to the due process claim on the ground that there is no federally protected liberty interest in parole
 6 (docket no. 4). Petitioner filed an opposition to the motion to dismiss on March 8, 2006 (docket no.
 7 5), and Respondent filed a reply on March 20, 2006 (docket no. 7). On August 21, 2006, the Court
 8 granted the motion to dismiss with respect to the equal protection claim, but denied the motion with
 9 respect to the due process claim upon finding that Petitioner had a liberty interest in parole (docket
 10 no. 9). The Court then re-issued the order to show cause and directed Respondent to show cause
 11 why the petition should not be granted.

12 On October 17, 2006, Respondent filed an answer (docket no. 10). Petitioner then filed a
 13 traverse on December 29, 2006 (docket no. 13).

14 STANDARD OF REVIEW

15 **I. AEDPA**

16 Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a district court may
 17 grant a petition challenging a state conviction or sentence on the basis of a claim that was
 18 "adjudicated on the merits" in state court only if the state court's adjudication of the claim:
 19 "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
 20 established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a
 21 decision that was based on an unreasonable determination of the facts in light of the evidence
 22 presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court has "adjudicated" a
 23 petitioner's constitutional claim "on the merits" for purposes of § 2254(d) when it has decided the
 24 petitioner's right to post-conviction relief on the basis of the substance of the constitutional claim
 25 advanced, rather than denying the claim on the basis of a procedural or other rule precluding state
 26 court review on the merits. Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004), cert. denied, 126
 27 S. Ct. 484 (2005). It is error for a federal court to review de novo a claim that was adjudicated on the
 28 merits in state court. See Price v. Vincent, 538 U.S. 634, 638-43 (2003).

Section 2254(d) applies to a habeas petition from a state prisoner challenging the denial of parole. See Sass v. California Bd. of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006).

A. Section 2254(d)(1)

Challenges to purely legal questions resolved by the state court are reviewed pursuant to § 2254(d)(1), under which a state prisoner may obtain habeas relief with respect to a claim adjudicated on the merits in state court only if the state court adjudication resulted in a decision that was "contrary to" or "involved an unreasonable application of" "clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 529 U.S. 362, 402-04, 409 (2000). While the "contrary to" and "unreasonable application" clauses have independent meaning, see id. at 404-05, they often overlap, which may necessitate examining a petitioner's allegations against both standards, see Van Tran v. Lindsey, 212 F.3d 1143, 1149-50 (9th Cir. 2000), overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63, 70-73 (2003).

1. Clearly Established Federal Law

"[C]learly established federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412. "Section 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." Id. "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17 (2003). If there is no Supreme Court precedent that controls on the legal issue raised by a petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly-established federal law. See, e.g., Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004).

The fact that Supreme Court law sets forth a fact-intensive inquiry to determine whether constitutional rights were violated "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established'" by the Supreme Court. Williams, 529 U.S. at 391. There are, however, areas in which the Supreme Court has not established a clear or consistent path for courts to follow in determining whether a particular event violates a constitutional right; in such an area, it may

be that only the general principle can be regarded as "clearly established." Andrade, 538 U.S. at 64-65. When only the general principle is clearly established, it is the only law amenable to the "contrary to" or "unreasonable application of" framework. See id. at 73.

Circuit decisions may still be relevant as persuasive authority to determine whether a particular state court holding is an "unreasonable application" of Supreme Court precedent or to assess what law is "clearly established." Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir. 2003), cert. denied, 540 U.S. 968 (2003); Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

2. "Contrary to"

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. A "run-of-the-mill state-court decision" that correctly identifies the controlling Supreme Court framework and applies it to the facts of a prisoner's case "would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406. Such a case should be analyzed under the "unreasonable application" prong of § 2254(d). See Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

3. "Unreasonable Application"

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 412-13.

"[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411; accord Middleton v. McNeil, 541 U.S. 433, 436 (2004) (per curiam) (challenge to state court's application of governing federal law must be not only erroneous, but objectively unreasonable); Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam) ("unreasonable" application of law is not equivalent to "incorrect" application of law).

Evaluating whether a rule application was unreasonable requires considering the relevant rule's specificity; if a legal rule is specific, the range of reasonable judgment may be narrow; if it is more general, the state courts have more leeway. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Whether the state court's decision was unreasonable must be assessed in light of the record that court had before it. Holland v. Jackson, 542 U.S. 649, 651 (2004) (per curiam).

The objectively unreasonable-standard is not a clear error standard. Andrade, 538 U.S. at 75-76 (rejecting Van Tran's use of "clear error" standard); Clark, 331 F.3d at 1067-69 (acknowledging the overruling of Van Tran on this point). After Andrade, "[t]he writ may not issue simply because, in our determination, a state court's application of federal law was erroneous, clearly or otherwise. While the 'objectively unreasonable' standard is not self-explanatory, at a minimum it denotes a greater degree of deference to the state courts than [the Ninth Circuit] ha[s] previously afforded them." Id. at 1068. In examining whether the state court decision was unreasonable, the inquiry may require analysis of the state court's method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003).

B. Section 2254(d)(2)

A federal habeas court may grant the writ if it concludes that the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An unreasonable determination of the facts occurs where the state court fails to consider and weigh highly probative, relevant evidence, central to the petitioner's claim, that was properly presented and made part of the state-court record. Taylor v. Maddox, 366 F.3d 992, 1005 (9th Cir. 2004). A district court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

C. Review of Parole Suitability Decisions

The Ninth Circuit has applied § 2254(d) to review of parole suitability decisions. See Rosas v. Nielsen, 428 F.3d 1229, 1232 (9th Cir. 2005) (per curiam); see also McQuillion v. Duncan, 306 F.3d 895, 901 (9th Cir. 2002) (assuming without deciding that AEDPA deferential standard of review under § 2254 applies to such decisions).

II. Exhaustion

Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The parties do not dispute that state court remedies were exhausted for the claims asserted in the instant petition.

FACTUAL BACKGROUND

Although Petitioner does not challenge the validity of his underlying criminal conviction, the BPT panel relied on facts regarding the commitment offense when denying Petitioner's parole in 2003. The facts regarding the circumstances surrounding the offense were read into the record at the hearing and were not objected to by Petitioner, and are in accord with those summarized in the probation report prepared for the sentencing court after Petitioner's conviction. The Court includes that summary here:

On [August 19, 1990] at approximately 4:00 A.M., victim [Brian] French had stopped his car for a redlight southbound Azusa at Hurley Avenue when [Petitioner] entered his car from the front passenger door, waving a broken beer bottle. He yelled drive, and fearing for his life, victim French complied. [Petitioner] began to speak in Spanish in an excited, agitated manner. In that victim French could understand no Spanish, he was unaware of what was going on but he did understand or thought he understood that this person was asking for help. Acting on the possibility that he was asking for help, victim French drove him to a friend's house in Hacienda Heights who spoke Spanish so he could find out what was going on.

When they arrived at [victim French's] friend's house, [Petitioner] exited the vehicle and started talking with victim [Oscar] Alvarez. Apparently he told victim Alvarez that he and a friend had been jumped by some "Cholos" and that he was fleeing when he got into victim French's car. After speaking for approximately 15 minutes, [Petitioner] wanted to know if victim French would drive him to Santa Ana, but was told that he could not do that because it was too far. He then said he needed money and asked if any of them had any. At this time, he was standing close by victim [Susan] Witzel and before anyone knew what was happening he had grabbed her by the hair with his left hand, and pulled her onto the hood of victim French's car where he held the broken beer bottle to her throat and demanded money. Fearing for victim Witzel's safety, victim Alvarez and French gave up all the money they had. He then ordered them to go into the house and while in the house he took some clothes and had victim Alvarez [] tie them in a bundle. He then ordered all of them in the car, and he got into the car and started driving. In the car, he was driving and holding victim Witzel in the front seat with the broken beer bottle with his right hand. He drove to the eastbound 60

freeway to the 57 freeway where he turned south toward Santa Ana. As he was driving he told victim Alvarez that he was going to go to Tijuana and asked him if he wanted to go with him or [if] he want[ed] to be let out. Alvarez felt that it would be in the best interest of all of them if he appeared cooperative and sympathetic towards [Petitioner] and he said that he would go with him to Tijuana, but they should stop and get some gas for the trip. [Petitioner] agreed and stopped at the Exxon gas station at 102 Main Street in Santa Ana.

As they were putting gas into the car [Petitioner] left the broken bottle of beer in the car, and at that time victim Witzel took the beer bottle and ran to a phone where she called the police. In that the beer bottle was no longer available to [Petitioner] both victim French and victim Alvarez overpowered him and waited for the police[s] arrival. When the police arrived they detained [Petitioner] but found that the crime had occurred in Los Angeles County, so Los Angeles County Sheriff's were called. When the Los Angeles Sheriff's arrived at the Santa Ana Station [Petitioner] was placed under arrest and booked on the indicated charges.

(Resp't Ex. 4, Probation Officer's Report at 2-4 [brackets and paragraph breaks added].)

Victims French, Alvarez and Witzel gave statements to probation officer and indicated that no one was injured and that there was no damage to the car. (*Id.* at 5-6.) They also expressed the hope that Petitioner would be "taken off the street for as long as possible." (*Id.*) Petitioner later gave his version of the events and acknowledged that "prior to the commission of his crime, he had consumed beer, wine, marijuana and cocaine." (Resp't Ex. 5, Life Prisoner Evaluation Report at 2.)

DISCUSSION

I. The Requirements of Federal Due Process

"In analyzing the procedural safeguards owed to an inmate under the Due Process Clause, [the Court] must look at two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Biggs v. Terhune*, 334 F.3d 910, 913 (9th Cir. 2003). The second prong of this test is satisfied if (1) the inmate has been afforded an opportunity to be heard and, if denied parole, informed of the reasons underlying the decision and (2) "some evidence" supports the decision to grant or deny parole. *Sass*, 461 F.3d at 1129 (adopting "some evidence" standard for disciplinary hearings outlined in *Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985)).

"To determine whether the 'some evidence' standard is met 'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the

evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached" by the parole board. Sass, 461 F.3d at 1128 (quoting Hill, 472 U.S. at 455-56). The "'some evidence' standard is minimal, and assures that 'the record is not so devoid of evidence that the finding of the . . . board were without support or otherwise arbitrary.'" Sass, 461 F.3d 1129 (quoting Hill, 472 U.S. at 457). The "some evidence" standard of Hill is clearly established law in the parole context for purposes of § 2254(d). Sass, 461 F.3d at 1129.

Three Ninth Circuit cases provide the guideposts for applying the Hill "some evidence" standard on this point: Biggs, Sass, and Irons v. Carey, No. 05-15275, slip op. 8335, 8344 (9th Cir. July 13, 2007). Biggs explained that the value of the criminal offense fades over time as a predictor of parole suitability: "The Parole Board's decision is one of 'equity' and requires a careful balancing and assessment of the factors considered. . . . A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the prison system and could result in a due process violation." Biggs, 334 F.3d at 916-17. Biggs upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, but cautioned that "[o]ver time . . . , should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date simply because of the nature of Biggs' offense and prior conduct would raise serious questions involving his liberty interest in parole." Id. at 916. Next came Sass, which criticized the Biggs statements as improper and beyond the scope of the dispute before the court: "Under AEDPA it is not our function to speculate about how future parole hearings could proceed." Sass, 461 F.3d at 1129. Sass determined that the parole board is not precluded from relying on unchanging factors such as the circumstances of the commitment offense or the petitioner's pre-offense behavior in determining parole suitability. See id. (commitment offenses in combination with prior offenses provided some evidence to support denial of parole at subsequent parole consideration hearing). Sass also put to rest any idea from Biggs that the commitment crime and pre-offense behavior only support the initial denial of parole. Recently, Irons determined that due process was not violated by the use of the commitment offense and pre-offense criminality to deny

1 parole for a prisoner sixteen years into his seventeen-to-life sentence. Irons emphasized that all
2 three cases (Irons, Sass and Biggs) in which the court had "held that a parole board's decision to
3 deem a prisoner unsuitable for parole solely on the basis of his commitment offense comports with
4 due process, the decision was made before the inmate had served the minimum number of years
5 required by his sentence." Irons, slip op. at 8349. Interpreting this statement from Irons to suggest
6 that the offense can only be relied on until the minimum number of years has been reached would
7 suffer the same problem that Sass identified in Biggs: it is not the holding of the case. The dicta in
8 Biggs and Irons are speculative and do not determine when a denial of parole based solely upon the
9 commitment offense or pre-offense behavior violates due process. Neither logic nor Irons compel a
10 decision that such reliance must cease when the prisoner reaches the minimum number of years in
11 his sentence, such as the fifteenth year of a fifteen-to-life sentence.

12 The upshot of these three cases is that the BPT can look at immutable events, such as the
13 nature of the conviction offense and pre-conviction criminality, to predict that the prisoner is not
14 currently suitable for parole even after the initial denial (Sass), but the weight to be attributed to
15 those immutable events should decrease over time as a predictor of future dangerousness as the
16 years pass and the prisoner demonstrates favorable behavior (Biggs and Irons). Sass did not dispute
17 the principle that, other things being equal, a murder committed fifty years ago is less probative of a
18 prisoner's current dangerousness than one committed ten years ago. Not only does the passage of
19 time in prison count for something, exemplary behavior and rehabilitation in prison count for
20 something according to Biggs and Irons. Hill's standard might be quite low, but it does require that
21 the decision not be arbitrary, and reliance on only the facts of the crime might eventually make for
22 an arbitrary decision.

23 What little guidance has come from the Supreme Court suggests that judicial review should
24 be extremely deferential to the original decision-maker in the parole context. In addition to the very
25 low evidentiary standard that Hill imposes, other Supreme Court comments suggest that the
26 judiciary should be quite mindful of the subjective and predictive nature of a parole board's decision.
27 See Greenholtz, 442 U.S. at 13. "No ideal, error-free way to make parole-release decisions has been
28

developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation." Id.

II. Standards for Granting Parole in California

California's parole scheme sets out the criteria which the BPT must evaluate when considering whether a prisoner is suitable for parole. Thus, in order to meet the requirements of due process, the BPT's determination that the prisoner is not suitable for parole under this scheme must be supported by some evidence.

A prisoner's first parole suitability hearing is to be held one year before the prisoner's minimum eligible parole release date. CAL. PENAL CODE § 3041(a). At the hearing, the parole board "shall" set a release date,

unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

Id. § 3041(b).

Title 15 of the California Code of Regulations §§ 2280 set forth the criteria the BPT must consider when determining whether a release date can be set for a prisoner like Petitioner, who is serving an indeterminate sentence for a conviction of kidnap for robbery. The opening paragraph of section 2281(a) states:

Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

CAL. CODE REGS. tit. 15, § 2281(a).

In making its determination, the parole board is to consider "[a]ll relevant, reliable information available," including the circumstances of the prisoner's:

. . . social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including

1 the use of special conditions under which the prisoner may safely be released to the
2 community; and any other information which bears on the prisoner's suitability for
3 release. Circumstances which taken alone may not firmly establish unsuitability for
parole may contribute to a pattern which results in a finding of unsuitability.

4 Id. § 2281(b).

5 Circumstances tending to show unsuitability for parole include the nature of the commitment
6 offense, and consideration of whether "[t]he prisoner committed the offense in an especially heinous,
7 atrocious or cruel manner." Id. § 2281(c). This includes consideration of the number of victims,
8 whether "[t]he offense was carried out in a dispassionate and calculated manner," whether the victim
9 was "abused, defiled or mutilated during or after the offense," whether "[t]he offense was carried out
10 in a manner which demonstrates an exceptionally callous disregard for human suffering," and
11 whether "[t]he motive for the crime is inexplicable or very trivial in relation to the offense." Id.

12 Other circumstances tending to show unsuitability for parole are a previous record of
13 violence, an unstable social history, previous sadistic sexual offenses, a history of severe mental
14 health problems related to the offense, and serious misconduct in prison or jail. See id.

15 Circumstances tending to support a finding of suitability for parole include no juvenile
16 record, a stable social history, signs of remorse, that the crime was committed as a result of
17 significant stress in the prisoner's life, a lack of criminal history, a reduced possibility of recidivism
18 due to the prisoner's present age, that the prisoner has made realistic plans for release or has
19 developed marketable skills that can be put to use upon release, and that the prisoner's institutional
20 activities indicate an enhanced ability to function within the law upon release. See id. § 2281(d).

21 The regulations also contain a matrix of suggested base terms that prisoners with
22 indeterminate sentences should serve before they are released on parole. The term is to be set
23 depending solely on the gravity of the "base offense," which is defined as "the most serious of all
24 life offenses for which the prisoner has been committed to prison." Id. § 2282(a).

25 The regulations specify that the matrix is invoked only after a life inmate is "found suitable
26 for parole." CAL. CODE REGS. tit. 15, §§ 2402(a), 2403(a). The California Code of Regulations
27 state that:
28

The panel shall first determine whether the life prisoner is suitable for release on parole. Regardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.

Id. § 2402(a).

Thereafter, the regulations state:

The panel shall set a base term for each life prisoner who is found suitable for parole. The base term shall be established solely on the gravity of the base crime, taking into account all of the circumstances of that crime. . . . The base term shall be established by utilizing the appropriate matrix of base terms provided in this section. The panel shall determine the category most closely related to the circumstances of the crime. The panel shall impose the middle base term reflected in the matrix unless the panel finds circumstances in aggravation or mitigation.

Id. § 2403(a).

Thus, California Penal Code § 3041 and the applicable regulations outlined above separate the suitability determination from setting a release date, and make it clear that the determination of an appropriate release date occurs only after deciding that an inmate is suitable for parole. CAL. PENAL CODE § 3041; In re Dannenberg, 34 Cal. 4th 1061, 1082-83 (2005). As a result, the BPT may lawfully deny parole without comparing Petitioner's offense to other inmates with the same offense, "to [the BPT's] base term matrices, or to the minimum statutory prison term for that offense." Id. at 1098. Because an inmate's base term can be set only once he has been found suitable for parole, the statutory scheme places individual suitability for parole above a prisoner's expectancy in an early setting of a fixed date designed to ensure term uniformity. See id. at 1070-71.

While subdivision (a) of section 3041 states that indeterminate life (i.e., life-maximum) sentences should "normally" receive "uniform" parole dates for similar crimes, subdivision (b) provides that this policy applies "*unless* [the Board] determines" that a release date cannot presently be set because the particular offender's crime and/or criminal history raises "*public safety*" concerns requiring further indefinite incarceration. (Italics added.) Nothing in the statute states or suggests that the Board must evaluate the case under standards of term uniformity before exercising its authority to deny a parole date on the grounds the particular offender's criminality presents a *continuing public danger*.

1 Id. at 1070 (brackets and parenthesis in original).

2 In sum, "the Board, exercising its traditional broad discretion, may protect public safety in
3 each discrete case by considering the dangerous implications of a life-maximum prisoner's crime
4 individually." Id. at 1071.

5 In addition, the California Supreme Court has determined that the facts of the crime can
6 alone support a sentence longer than the statutory minimum even if everything else about the
7 prisoner is laudable. "While the Board must point to factors beyond the minimum elements of the
8 crime for which the inmate was committed, it need engage in no further comparative analysis before
9 concluding that the particular facts of the offense make it unsafe, at that time, to fix a date for the
10 prisoner's release." Id.; see also In re Rosenkrantz, 29 Cal. 4th 616, 682-83 (2002), cert. denied, 538
11 U.S. 980 (2003) ("[t]he nature of the prisoner's offense, alone, can constitute a sufficient basis for
12 denying parole" but might violate due process "where no circumstances of the offense reasonably
13 could be considered more aggravated or violent than the minimum necessary to sustain a conviction
14 for that offense").

16 **III. Analysis**

17 **A. Opportunity to Be Heard and Reasons for Denial**

18 Having stated that California inmates still maintain a liberty interest, the Court analyzes the
19 next prong of the Biggs test. Under the second prong of the Biggs test, the first question pertains to
20 whether Petitioner was given an opportunity to be heard and whether he was given reasons for the
21 parole denial. See Biggs, 334 F.3d at 913; Sass, 461 F.3d at 1126; Greenholtz, 442 U.S. at 16.

22 Petitioner fully participated in his parole hearing with the help of an interpreter, as evidenced
23 by the transcript of the hearing. (Resp't Ex. 3.) Throughout the hearing, Petitioner was given the
24 opportunity to make comments or objections in response to the BPT's statements, clarify any
25 misunderstandings and give statements regarding his parole eligibility. (Id.)

26 In addition, the BPT laid out detailed reasons for denying Petitioner's parole, which are
27 discussed further below. The Court finds that the BPT satisfied the requirements for due process
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under this prong.

B. "Some Evidence" Standard

1. The 2003 Parole Hearing

Petitioner argues that the facts of the crime do not constitute some evidence, thus, the BPT's 2003 parole denial is in violation of his due process rights. (Pet. at 3.) The relevant question is whether there is some evidence to support the BPT's denial of parole. See Sass, 461 F.3d at 1129 (adopting the "some evidence" standard for disciplinary hearings outlined in Hill, 472 U.S. at 454-55 (1985)). The BPT determined that the Petitioner was unsuitable for parole on a variety of grounds, including the nature of the underlying offense, his unstable history and pattern of escalating criminal conduct, his need to continue self-help and therapy, his negative psychological evaluation, and the District Attorney's opposition to parole.

a. The Nature of the Offense

At the 2003 parole suitability hearing, the BPT found that Petitioner "would pose an unreasonable risk of danger to society or a threat to public safety if released from prison at this time." (Resp't Ex. 3 at 46:12-14.) The panel found that the "paramount reason" for such a finding was the "timing and gravity of the committing offense." (Id. at 46: 14-16.) The BPT found that the commitment offense was carried out in a manner that was "especially cruel and vicious." (Id. at 46: 17.) The BPT also found that multiple victims were involved in the kidnaping, i.e., a total of three victims, and that the "motive for the crime was inexplicable and very trivial in relationship to the offense, needing a ride to Mexico and claiming that [Petitioner] had just been jumped by Cholos." (Id. at 46:17-18, 47:9-13.) In support of these findings, the BPT summarized the evidence regarding the kidnaping offenses as follows:

You accosted the two victims initially at a stoplight. They tried to be good Samaritans, they thought that you needed some help. They took you to their friend's -- Mr. Alvarez -- home because he spoke some Spanish and you didn't speak any English at the time to try to help you. The offense was carried out in a dispassionate and insensitive manner. You know after they tried to help you here then you took them all and forced them to -- with a broken bottle point threatened them with their lives, you grabbed the young woman around the neck, grabbed her by her hair, threatened her life, you did this, as I said, with a broken bottle point, forcing them to drive towards Mexico.

(Id. at 46:21-47:9.)

b. Unstable Social History

The BPT found Petitioner unsuitable for parole on other grounds, including that Petitioner "has a history of unstable tremulous relationships with others commencing at an early age." (Id. at 47:16-18.) It noted that he dropped out of school around the ninth grade and developed a substance abuse problem with alcohol and drugs around the age of thirteen. (Id. at 47:18-22.) Additionally, the BPT noted that there "is an escalating pattern of criminal conduct and violence that the prisoner has as he entered the United States illegally around the age of 17 or 18." (Id. at 47:22-25.)

c. Unfavorable Psychological Evaluation and Need for Therapy

The BPT also determined that Petitioner had "not sufficiently participated in beneficial self-help and therapy." (Id. at 47:25-48:1.) Relying on Petitioner's psychosocial report authored by M. E. Gleason, Ph.D., dated April 10, 2003, the BPT found that Petitioner's examiner was not "totally supportive of release" because the doctor wrote that "the most significant risk factor for this prisoner which could be a precursor to violence would be a return to the use of alcohol and/or drugs." (Id. at 48:1-8.) Despite examining the factors of suitability that would support parole, i.e., that Petitioner had plans for where to live and work if released (Mexico) and that his counselor believes him to be a "low degree of threat if released to the public," the Panel found that Petitioner still "need[ed] therapy in order to face, discuss, understand and cope with stress in a non-destructive manner so that the prisoner can better understand the causative factors of why he committed the kidnap of three people and . . . threatening the victims . . . [in a] very insensitive and uncaring manner." (Id. at 48:16 - 49:13.) The BPT determined that "[u]ntil progress is made the prisoner continues to be unpredictable and a threat to others." (Id. at 49:13-15.)

The BPT noted:

The prisoner's gains . . . are recent and he must demonstrate the ability to maintain these gains over an extended period of time. He's been participating in AA since 2000, he's on a waiting list for the Impact program currently, just recently completed a vocational trade of offset print shop. . . . [H]e's accomplished ESL, English as a second language, and he should be commended for that and his ability -- that he's achieved a GED as well completing the ESL, as well as not having any 115s in his entirety while he's been incarcerated. However, these positive aspects of his behavior do not outweigh the factors of unsuitability at this time.

(Id. at 49:15-50:6.)

d. District Attorney's Opposition to Parole

The Deputy District Attorney of Los Angeles County opposed Petitioner's suitability for parole. The BPT took notice that "the District Attorney's Office . . . of Los Angeles County had a representative present in opposition." Id. at 48:23-25.

e. Conclusion

In conclusion, the panel listed fact-specific reasons to support its finding that Petitioner unsuitable for parole:

That the prisoner committed the offense in a cruel and vicious manner as I mentioned earlier. There were multiple victims who were attacked, Mr. French, Ms. Witzel and Mr. Alvarez, in that same offense. . . . The victims tried to help the prisoner, tried to be good Samaritans. As he did not speak Spanish they took him to a friend's home. He ended up kidnapping Mr. Alvarez. As I said earlier, the motive for the crime was inexplicable and very trivial in relationship to the offense. [Petitioner] needed a ride to Mexico, claiming that he had been accosted by Cholos prior to -- The prisoner has a history of unstable tremulous relationships with others . . . commencing at an early age, dropping out of school while in the ninth grade, forming a problem -- developing a problem with substance abuse around the age of 13 as well as entering the United States illegally. Therefore, a longer period of observation or evaluation of the prisoner is called for before the Board should find that he is suitable for parole.

(Id. at 50:11-51:8 [brackets added].)

The Court finds that the BPT's 2003 decision was based on a reasonable determination of the facts and that there was some evidence to support the conclusion to deny Petitioner's parole. 28 U.S.C. 2254(d)(2).

2. Superior Court Denial

On state habeas corpus review, the Los Angeles County Superior Court determined in a reasoned opinion that "the Board's decision to decline to set a parole date [was] appropriate in this instance." (Resp't Ex. 7, Order Re: Writ of Habeas Corpus at 1.) Upon review of the record and the BPT's findings, the superior court determined that there was some evidence to support the finding that "the commitment offense was carried out in an especially cruel and vicious manner." (Id.) "It demonstrated an exceptionally callous disregard for human suffering. Plus the nature for the crime is inexplicable and very trivial in relationship to the offense." (Id. [internal citations omitted].) The

superior court also noted that the BPT's finding of Petitioner's "history of unstable tremulous relations with others commencing at an early age." (*Id.*) Citing to *In re Rosenkrantz*, 29 Cal. 4th 616, 652 (2002), the court determined that the aforementioned findings were supported by "some evidence." (*Id.*) The court also noted that the record "reflects the Board considered [Petitioner's] post conviction gains but concluded they did not outweigh 'consideration of public safety.'" (*Id.* at 2.) The court concluded: "Because there is some evidence to support the finding, [Petitioner] would 'pose an unreasonable risk of danger to society if released from prison'. . . . [t]he Board did not abuse its discretion in denying parole for [Petitioner] at the 2003 hearing." (*Id.* [internal citations omitted].)

Because the superior court's decision is the last reasoned decision regarding Petitioner's challenge to the 2003 hearing, it is this decision which the Court reviews under 28 U.S.C. § 2254(d). See *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2041 (2006).

Having reviewed the facts of the crime as recited by the BPT and the state court, and the other reasons stated for finding Petitioner ineligible for parole, the Court finds that there was some evidence in the record to support the BPT's decision.

The Court concludes that the state court's decision to uphold the BPT's findings was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, 28 U.S.C. § 2254(d)(2), nor was it contrary to, or an unreasonable application of, clearly established federal law, *id.* § 2254(d)(1). Accordingly, Petitioner's due process challenge to his 2003 parole hearing is DENIED.

C. Other Arguments

Petitioner makes three additional arguments: (1) that to deny him parole based on his commitment offense violates his due process rights, (2) that he is long overdue for parole under the state's sentencing matrix, in violation of his due process rights, and (3) that the implementation of an anti-parole or under-inclusion policy by the BPT also violates his due process rights. The Court finds that these arguments must fail, as follows:

1. Biggs Argument

1 Petitioner argues that the "Board's continual use of the crime [and] prior history, as a basis to
2 deny parole violates Federal due process." (Pet. at 11.) Moreover, Petitioner claims that the BPT
3 "relied solely on the commitment offense and prior history, to justify it's [sic] illegal finding of
4 unsuitability." (Id.) Petitioner cites Biggs for the proposition that "continued reliance in the future
5 on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs
6 contrary to the rehabilitative goals espoused by the prison system and could result in a due process
7 violation." (Id. [quoting Biggs, 334 F.3d at 917].)

8 In Biggs, the prisoner was serving a sentence of twenty-five years to life following a 1985
9 first degree murder conviction. In the case before the Ninth Circuit, Biggs challenged the 1999
10 decision by the BPT finding him unsuitable for parole despite his record as a model prisoner. Id. at
11 913. While the Ninth Circuit rejected several of the reasons given by the BPT for finding Biggs
12 unsuitable, it upheld three: (1) the commitment offense involved the murder of a witness, (2) the
13 murder was carried out in a manner exhibiting a callous disregard for the life and suffering of
14 another, and (3) Biggs could benefit from therapy. Id. The Ninth Circuit found no due process
15 violation and upheld the prisoner's parole denial based solely on the nature of the crime and conduct
16 before incarceration. Id. at 916.

17 Petitioner's reliance on Biggs to support his argument that denial of suitability in his
18 individual case is misplaced. First, although the Ninth Circuit in Biggs cautioned the BPT that
19 continued reliance in future parole suitability hearings on the commitment offense may violate due
20 process, id. at 916-17, it did so only in dicta. Not only is it not Supreme Court law, but the Ninth
21 Circuit has also recently criticized the statements in Biggs as being improper and beyond the scope
22 of the dispute before the court. The Ninth Circuit stated, "Under AEDPA, it is not our function to
23 speculate about how future parole hearings could proceed." Sass, 461 F.3d at 1129. Sass confirmed
24 that "evidence of [a prisoner's] prior offenses and the gravity of his convicted offenses constitute
25 some evidence to support the [b]oard's decision." Id. In light of Sass, the BPT's consideration of
26 Petitioner's conviction offense and prior criminal conduct satisfies the minimal "some evidence"
27 requirement.
28

1 Secondly, it must be noted that the BPT did not rely solely on the commitment offense and
2 prior history in denying Petitioner suitability for parole at his fourth parole hearing. The BPT relied
3 on several factors, including Petitioner's underlying offense, his unstable history and pattern of
4 escalating criminal conduct, his need to continue self-help and therapy, his negative psychological
5 evaluation, and the District Attorney's opposition to parole, before finding him unsuitable for parole.

6 Accordingly, the Court finds no merit to Petitioner's claim because he cannot rely on the
7 dicta in Biggs to demonstrate that the BPT violated his due process rights by denying him parole
8 suitability.

9 2. Matrix Argument

10 Petitioner also argues that the BPT violated his right to due process because he is overdue for
11 release under the BPT's sentencing matrix. (Pet. at 5-11.) Petitioner argues that he, with post
12 conviction credits, has "served over 18.5 years, twice his matrix" and that "his term of confinement
13 has become disproportionate to his offense, based on no real evidence that Petitioner is a current risk
14 or threat to society." (Id. at 6.)

15 As explained previously, the matrix is not consulted and a term is not set under state law
16 unless and until the prisoner is found suitable for parole. See In re Dannenberg, 34 Cal. 4th at 1070-
17 71; CAL. CODE REGS. tit. 15, § 2403(a). Petitioner was not found suitable for parole; therefore, the
18 matrix did not need to be consulted. Moreover, the BPT determined that Petitioner was unsuitable
19 for parole after considering the factors outlined above. Thus, Petitioner's claim that there was "no
20 real evidence" to deny him parole is unavailing. Even if Petitioner had a due process right in having
21 state law followed by the parole authority, state law was followed by the BPT.

22 Accordingly, Petitioner's claim is without merit.

23 3. Anti-Parole Argument

24 Petitioner argues that the finding of "unsuitability was arbitrary and capricious, due to the
25 BPT carrying out it's [sic] function of 'under-inclusion' or 'systematic bias,' denying parole to ninety
26 nine percent of all cases that come before it." (Pet. at 13.)

27 A state prisoner is entitled to habeas relief under 28 U.S.C. § 2254 only if he is held in
28

1 custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. 2254(a);
 2 see also 28 U.S.C. § 2241(c)(3). A petitioner has the burden of alleging specific facts that show a
 3 federal claim is presented, or the petition is subject to dismissal. Jones v. Gomez, 66 F.3d 199, 204-
 4 05 (9th Cir. 1995). Specific factual allegations, not conclusions, are required. Id.; Boehme v.
 5 Maxwell, 423 F.2d 1056, 1058 (9th Cir. 1970).

6 Here, Petitioner alleges in a conclusory manner that the BPT has an anti-parole or under-
 7 inclusion policy because it grants parole in only one percent of cases. However, he fails to allege
 8 any facts demonstrating the BPT's denial of parole was because of such alleged bias instead of the
 9 individualized determination of suitability for parole. Rather, his allegations are limited to one brief
 10 paragraph without any citation to the record, other evidence, or any legal authority. As a result,
 11 Petitioner's bias claim is too conclusory to establish a basis for federal habeas relief. Jones, 66 F.3d
 12 at 204-05; Boehme, 423 F.2d at 1058.

13 Even if Petitioner could show the existence of such a policy, the transcript of the proceeding
 14 and the decision show that the BPT considered Petitioner's suitability on an individual basis and in
 15 considerable detail. (Resp. Ex. 3.) Based on the records before the Court, there is no indication that
 16 the BPT's decision was based on an anti-parole or under-inclusion policy.

17 Accordingly, the Court finds no merit to Petitioner's due process challenge to his 2003 parole
 18 denial based on allegations that the BPT has an anti-parole or under-inclusion policy.

19 CONCLUSION

20 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED as to all
 21 claims. The Clerk of the Court shall enter judgment, terminate all pending motions, and close the
 22 file.
 23

24 IT IS SO ORDERED.

25 DATED: 7/23/07

26 
 27 SAUNDRA BROWN ARMSTRONG
 28 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FLORES,

Case Number: CV04-03409 SBA

Plaintiff,

v.

CERTIFICATE OF SERVICE

SCHWARZENEGGER et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 23, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Manuel Flores E-75537

Correctional Training Facility

P.O. Box 689

Soledad, CA 93960-0689

Dated: July 23, 2007

Richard W. Wieking, Clerk

By: LISA R CLARK, Deputy Clerk